

**BEFORE THE FAIR POLITICAL PRACTICES COMMISSION**

In the Matter of:	)	
	)	
Opinion Requested by	)	No. O-00-045
Joe Galligan, Burlingame	)	June 2, 2000
City Councilmember	)	
	)	

---

**BY THE COMMISSION:** We have been asked the following question by Joe Galligan, Burlingame City Councilmember

**I. Question**

Does Councilmember Galligan have a disqualifying conflict of interest in a decision to certify an environmental impact report (EIR) on a proposed office project due to his economic interest in a bank that holds the note on the subject property, if the effect on the economic interest is the same regardless of the decision?

**II. Conclusions**

- A. Under Government Code Section 87103,<sup>1</sup> if it is reasonably foreseeable that a governmental decision will have a financial effect on an official's economic interest, the official will have a disqualifying conflict of interest if the financial effect on the economic interest is material unless it is indistinguishable from its effect on the public generally. In the present case, the relevant inquiry is whether it is substantially likely that a material financial effect will occur
- B Under the specific facts presented to the Commission, it is not reasonably foreseeable that the decision to certify (or not) the EIR will have a material financial effect on Mr. Galligan's economic interest. Therefore, he is not disqualified from participating in the Council's upcoming vote on certifying the EIR.

---

<sup>1</sup> All statutory references are to the Government Code unless otherwise indicated.

### III. Facts

We first note that the Commission is not a finder of fact and accepts as accurate, for purposes of this opinion, those facts presented by the requester, Mr. Galligan.<sup>2</sup>

A limited partnership controlled by the Glenborough Realty Trust ("Glenborough") owns real property at 301 Airport Boulevard in Burlingame ("city"). Glenborough has applied to the city for the approvals necessary to construct a 488,000 square foot office project on the property. The governmental decisions before the city council will be whether to adopt a statement of overriding consideration regarding significant and unavoidable effects and to certify the EIR, both of which are necessary steps in the approval process.

The property at 301 Airport Boulevard was financed by Glenborough through a loan in excess of \$10 million from Mid-Peninsula Bank (MPB), which holds a deed of trust on the property. This financing is typically characterized as a "bridge loan." Annual interest paid to MPB from that loan is in excess of \$500,000. Glenborough is a national corporation with the financial ability to undertake major commercial development projects.

Councilmember Galligan serves as a member of the board of directors of Peninsula Bank of Commerce (PBC). Mid-Peninsula Bank and PBC are two of ten banks in the Bay Area wholly owned by Greater Bay Bancorp (GBB), a NASDAQ-traded company with 12.3 million shares outstanding. Councilmember Galligan owns 35,000 shares of GBB valued in excess of \$1,000.

Councilmember Galligan states that whether or not the EIR is certified, the bridge loan will be repaid in advance of its January 17, 2001 due date. Councilmember Galligan informs the Commission that, if the EIR is certified by the city council, the bridge loan from MPB will be paid off from the proceeds of a construction loan that will be secured by Glenborough to complete the project. If the EIR is not certified, the loan will be paid off from other Glenborough funds. Councilmember Galligan has also indicated that the value of the financed property is approximately twice as much as the amount of the loan.

Councilmember Galligan wishes to participate in the council's deliberations on the project. The matter is scheduled for a public hearing by the city council on June 7, 2000, and scheduled for a vote on June 19, 2000.

---

<sup>2</sup> As has long been recognized, "The Commission does not act as a finder of fact when it issues legal opinions. Our opinion is applicable only to the extent that the facts provided to us are correct and that all of the material facts have been provided." *In re Oglesby* (1975) 1 FPPC 71, p. 7, n. 6.

#### IV. Analysis

The Commission uses a standard, eight-step analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision. (Regulation 18700(b)(1) - (8) ) The issues presented here involve only the sixth step in that analysis (Regulations 18700(b)(6), 18706 )

**Step 6: Is it reasonably foreseeable that the city council's decision on the EIR appeal will have a material financial effect on Galligan's economic interest?**

Since MPB is a wholly owned subsidiary of NASDAQ-traded GBB, we analyze the council's decision regarding the EIR under Regulation 18705.1(b)(2). Applying that regulation to the facts at hand, the relevant inquiries will be whether:

- (1) MPB's gross revenues will increase or decrease by \$150,000 or more in a fiscal year, *or*
- (2) MPB's expenses will increase or decrease by \$50,000 or more in a fiscal year; *or*
- (3) The value of MPB's assets or liabilities will increase or decrease by \$150,000 or more (Regulations 18705.1(b)(2), 18706 )

None of the banks in which Mr. Galligan has an economic interest is requesting the land use approvals. Additionally, the financial security of the borrower and the nearly 2-to-1 ratio of land value to loan balance make losses due to foreclosure unlikely. For these reasons, it is not likely that any bank will incur or avoid additional expenses or reduce or eliminate existing expenses as a result of the city council's decision on the EIR. (Regulation 18705.1(b)(2)(B) ) Similarly, since the subject property is not owned by any of the banks, none of them is substantially likely to see an increase or decrease in the value of its assets or liabilities as a result of the council's decision.<sup>3</sup> (Regulation 18705.1(b)(2)(C).) Thus, the question turns on the financial effect of the city council's EIR decision on the *gross revenues* of MPB. (Regulation 18705 1(b)(2)(A).)

Early repayment of the loan would reduce the amount of interest, and thereby, the gross revenues, which MPB is entitled to receive under the loan contract. If it is substantially likely that the loan will be repaid early enough to result in a loss of interest income of \$150,000 or more to MPB as a result of the city council's decision, Mr. Galligan could have a disqualifying conflict of interest on that basis. Councilmember Galligan informs the Commission that if the EIR is certified, Glenborough will repay the bridge loan from MPB early out of the proceeds of

---

<sup>3</sup> This opinion does not address the admittedly open question of whether the property interest arising out of a deed of trust securing a loan renders the real property an asset of the lender for purposes of conflicts analysis under the PRA. That issue is among those being considered by the Commission as part of the Project A discussions in its ongoing Conflict of Interest Regulatory Improvement Project.

construction financing arranged to complete the office park project. However, Mr. Galligan questions whether this governmental decision would be the cause of a material financial effect on his economic interest if the same result will occur (early repayment and loss of interest income) regardless of the particular governmental decision. If the EIR is not certified, the councilmember says, Glenborough will choose one of three alternatives. First, Glenborough may get financing for an alternative development of the property, and repay the bridge loan from MPB early. Second, Glenborough may sell the property, and repay the loan from the proceeds of the sale. Finally, Glenborough could choose to repay the loan from existing capital. Under any of those scenarios, the councilmember argues, the loan would be repaid in approximately the same early time frame as it would be if the EIR is certified.

Councilmember Galligan's argument is this: since early repayment of the loan held by MPB is likely to occur whether the council certifies the EIR, votes against certification or takes no action, the council's action cannot be said to be the cause of the financial effect on MPB, his economic interest. He has asked the Commission whether, under these facts, he should be disqualified from participating in the decision on certification of the EIR for 301 Airport Boulevard.

## **V. Discussion**

The Commission notes at the outset that the facts presented by Councilmember Galligan are unique, both in their complexity and in that they comprise a case of first impression on the question of whether a governmental decision can be said to cause a material financial effect on an economic interest if the same result would occur regardless of the outcome of the governmental decision. The Commission is issuing this opinion to resolve the latter question of statutory interpretation regarding the causation test in Section 87103. The outcome of the conflict analysis as to Mr. Galligan is unique, however, as are all fact-specific conflict analyses.

### **A. Conclusion upholding the *In re Thorner* causation standard**

The statutory basis for a causal connection between the governmental decision and an effect on the public official's economic interest is found in Section 87103:

"A public official has a financial interest in a decision within the meaning of Section 87100 if it is *reasonably foreseeable that the decision will have a material financial effect*, distinguishable from its effect on the public generally, on [one or more of the official's economic interests]." (Section 87103. Emphasis added.)

The regulatory language connecting the governmental decision to an effect on an official's economic interest is in Regulation 18706, which provides

"A material financial effect on an economic interest is reasonably foreseeable, within the meaning of Government Code section 87103, if it is *substantially likely* that one or more of the materiality standards (see Cal. Code Regs., tit 2, §§ 18704, 18705) applicable to that economic interest will be met as a result of the governmental decision."<sup>4</sup> (Emphasis added.)

In *In re Thorner* ( (1975) 1 FPPC Ops. 198), the Commission, among other things, held that "reasonably foreseeable" means "substantially likely." Whether the financial consequences of a governmental decision are substantially likely at the time the decision is made is highly situation-specific. A financial effect need not be a certainty to be considered reasonably foreseeable; a substantial likelihood that it will occur suffices to meet the standard. On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable. (*Ibid*)

Mr. Galligan's argument is that a causative relationship should be questioned if, in the absence of the purported cause, the same result would ensue. Councilman Galligan asks that the Commission opine that a public official is disqualified from participating in a governmental decision only when it is reasonably foreseeable that a material financial effect on the official's economic interest would not occur but for the governmental decision.

The Commission believes it is unnecessary to depart from the wisdom of *In re Thorner*, which requires only a determination that a material financial effect is *substantially likely* to occur. Accordingly, the Commission finds that, under Section 87103, if it is reasonably foreseeable (or substantially likely) that a governmental decision will have a financial effect on an official's economic interest, the official will have a conflict if the financial effect on the economic interest is material unless the financial effect is indistinguishable from its effect on the public generally.

#### **B. Conclusion as to Councilmember Galligan's participation in the decision**

With regard to Councilmember Galligan's participation in the appeal before the city council of the planning commission's decision not to certify the EIR on 301 Airport Boulevard, the question of early repayment of the loan is too speculative and subject to contingencies for the Commission to determine that it is substantially likely to occur early enough to result in a material financial effect. Intervening factors, such as the possibility of lawsuits enjoining

---

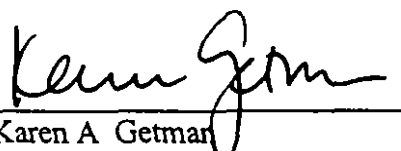
<sup>4</sup> Regulation 18706 was added to the regulations when the Commission adopted the "eight-step" standard analysis of conflicts issues in October 1998. (See Regulation 18700(b), this was phase 1 of the Commission's conflicts improvement program, phase 2 of which is presently ongoing.)

construction, alternative use proposals by Glenborough, and the independent and subjective decision by Glenborough to retire the loan early in any instance, make it impossible to say that a material financial effect is substantially likely<sup>5</sup>

Based on the facts presented to us, and limited to those facts, we conclude that it is not reasonably foreseeable that the council's decision will have a material financial effect on the councilmember's economic interest. Therefore, Councilmember Galligan is not disqualified from participating in the EIR certification decision regarding the property at 301 Airport Boulevard.

Approved by the Commission on June 2, 2000. Concurring as to Conclusion A are Commissioners Deaver, Getman, Makel, Scott and Swanson,

Concurring as to Conclusion B are Commissioners Deaver, Getman, and Makel  
Dissenting as to Conclusion B are Commissioners Scott and Swanson.

  
\_\_\_\_\_  
Karen A. Getman  
Chairman

---

<sup>5</sup> Since the materiality threshold is \$150,000, there is some date prior to the loan due date on which the remaining interest will fall below the materiality threshold and there will be no material financial effect on the bank due to early repayment